IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MANUEL GRANERO	:	
Plaintiff	:	CIVIL ACTION
	:	NO. 98-3077
v.	:	
	:	CRIMINAL ACTION
UNITED STATES OF AMERICA	:	NO. 91-578-1
Defendant	:	

MEMORANDUM AND ORDER

YOHN, J. March , 2000

On December 13, 1991, a jury convicted Manuel Granero of conspiracy to distribute cocaine and of aiding and abetting the distribution of cocaine. He exhausted his direct appeal. On August 17, 1994, Granero filed a pro se motion to have his sentence vacated, set aside, or corrected under 28 U.S.C. § 2255. In that motion, he claimed eight grounds for ineffective assistance of his trial counsel. After appointment of counsel and an evidentiary hearing, the court denied his motion, and the Third Circuit affirmed that denial. Granero has now filed a second pro se § 2255 motion, which the Third Circuit certified pursuant to the Antiterrorism and Effective Death Penalty Act ["AEDPA"]. After appointing counsel for Granero, the court permitted the amendment of the second pro se § 2255 motion. Pending before the court is this amended motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (Doc. No. 89).[1]

[1]The Bureau of Prisons has advised the court that Granero completed his term of imprisonment as of September 13, 1999, and began his five-year term of supervised release. He has since been transferred to the custody of the Immigration and Naturalization Service for deportation. On October 8, 1999, he was deported to Uruguay.

Granero's claim of newly discovered evidence does not warrant relief. Granero's diligence in pursuing this new evidence is unclear. Moreover, even assuming its truth, this evidence is merely impeaching.

Granero's claims of a faulty jury charge and of prosecutorial misconduct are unsuccessful because he failed to raise them at trial and/or pursue them on appeal, and because he has not demonstrated any cause for these failures. Similarly, because in his first § 2255 motion Granero neglected to raise these failures as grounds for relief due to ineffective assistance of counsel, and because he has not suggested any cause for this failure, the ineffective assistance claims in this § 2255 motion are also unsuccessful.

For all of these reasons, the court will deny Granero's motion.

I. Legal Standard

As the Supreme Court has recognized, "[h]abeas review is an extraordinary remedy and will not be allowed to do service for an appeal." *Bousley v. United States*, 118 S. Ct. 1604, 1610 (1998) (internal quotation marks omitted). Thus, "where a defendant has procedurally defaulted a claim by failing to raise it on direct review, the claim may be raised in habeas only if the defendant can first demonstrate either 'cause' and actual 'prejudice,' or that he is 'actually innocent.'" *Id*. at 1611 (citations omitted) (applying this standard to a petitioner's § 2255 motion).

When a criminal defendant comes forward with new evidence, however, a different test is applied. New evidence can lead to a new trial if the following requirements are satisfied:

"(a) [T]he evidence must be in fact newly discovered, i.e., discovered since trial;
(b) facts must be alleged from which the court may infer diligence on the part of the movant;
(c) the evidence relied on must not be merely cumulative or impeaching;
(d) it must be material to the issues involved; and
(e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal."

Government of the Virgin Islands v. Lima, 774 F.2d 1245, 1250 (3d Cir. 1985) (quoting *United States v. Iannelli*, 528 F.2d 1290, 1292 (3d Cir. 1976)).[2]

II. Discussion

The Third Circuit certified Granero's second § 2255 motion without an opinion or any other indication as to which grounds for relief had passed AEDPA's procedural hurdles. Therefore, the court will consider each claim raised in Granero's amended second motion to vacate, set aside, or correct sentence.

A. Ground One

As his first ground for relief, Granero claims that he has newly discovered evidence that a "government witness was lying under oath about his contacts with defendant." Am. Mot. Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence (Doc. No. 89) ["Pl.'s Am. Mot."] at 3. At trial, Granero claimed that he had never met his co-conspirators before they were arrested together. *See United States v. Granero*, CIV. No. 94-5040, CRIM. No. 91-578-1, 1995 WL

[2]Although the Third Circuit set forth this test in the context of a Federal Rule of Criminal Procedure 33 motion for a new trial, it has been applied to a § 2255 motion when a claim of new evidence is raised. *See, e.g., United States v. Blount*, 982 F. Supp. 327, 330 (E.D. Pa. 1997).

394140, at *2 (E.D. Pa. June 30, 1995). This claim, however, was directly contradicted by the testimony of Richard "Ricky" Ortiz, a government witness. On December 10, 1991, Ricky Ortiz testified that one of his father's friends, Miguel Ortiz (no relation), introduced him to Granero the summer before the drug deal occurred for which he and Granero were arrested. *See* Pl.'s Am. Mot. at 3-4. Granero now claims to have met with Ricky Ortiz's father, Angel Ortiz, on October 10, 1997, and to have been told by him "that he had never met Manuel Granero before, that he does not know a Miguel Ortiz and that Richard Ortiz is lying." Pl.'s Am. Mot. at 4. Granero argues that this newly discovered evidence warrants relief.

As previously explained, newly discovered evidence will lead to a new trial only if the following requirements are met:

> "(a) [T]he evidence must be in fact newly discovered, i.e., discovered since trial;
> (b) facts must be alleged from which the court may infer diligence on the part of the movant;
> (c) the evidence relied on must not be merely cumulative or impeaching;
> (d) it must be material to the issues involved; and
> (e) it must be such, and of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal."

Lima, 774 F.2d at 1250 (quoting *Iannelli*, 528 F.2d at 1292). Because Granero's newly discovered evidence fails to meet both the second and third requirements, the court does not reach the fourth and fifth requirements.

There are no facts alleged suggesting diligence on the part of Granero in pursuing this evidence. Granero claims that Ricky Ortiz made his allegedly false statement on December 10, 1991. He also claims that Angel Ortiz made his contradictory statement on October 10, 1997. Granero has, however, offered no explanation for the almost six-year lapse between the false

statement and the contradictory statement. He has not made any claim that it was difficult to locate Angel Ortiz or persuade him to talk. He has not offered any explanation of why the alleged inaccuracy of Ricky Ortiz's testimony on this matter could not have been pursued at trial. Granero has alleged no facts that would support an inference of diligence, so his newly discovered evidence fails to meet the second requirement.

Additionally, Granero's new evidence is merely impeaching. It does nothing more than contradict the testimony of Ricky Ortiz (on a peripheral matter); it is not exculpatory. Thus, this newly discovered evidence fails to meet the third requirement, as well.

For both of these reasons, the court concludes that Granero's newly discovered evidence does not warrant relief. Consequently, the court will deny Granero's motion with respect to Ground One.

B. Grounds Two and Three

As his second ground for relief, Granero claims that the trial judge incorrectly declined to charge the jury regarding his alibi defense. *See* Pl.'s Am. Mot. at 4-5. As his third ground for relief, Granero asserts that the prosecutor's closing statement contained an improper reference to Granero being a drug dealer.[3] *See id*. at 5-6.

Both of these alleged problems occurred at trial, so the claims based on them could and should have been pursued on direct appeal, as well as in Granero's first § 2255 petition. Because these claims were not pursued on direct appeal, Granero has procedurally defaulted with respect

[3]The prosecutor allegedly told the jury that "[t]he only people that you have seen, other than the agents, are drug dealers." Pl.'s Am. Mot. at 5.

to them. *See Bousley*, 118 S. Ct. at 1611. Consequently, Granero must show both cause for his failure to raise and pursue these claims and actual prejudice resulting from his failure to raise them, or he must demonstrate his actual innocence. *See id*. In his amended motion, Granero makes no attempt to demonstrate cause for his failure to pursue these issues. He also fails to demonstrate his actual innocence. For these reasons, the court will deny his motion with respect to Grounds Two and Three.

C. Ground Four

As his fourth ground for relief, Granero raises ineffective assistance claims against his trial counsel for failing to object to the prosecutor's closing statement drug dealer reference and against his appellate counsel for failing to pursue the issue of the alibi charge on appeal. *See* Pl.'s Am. Mot. at 6.

In 1993, the Third Circuit held that a claim of ineffective assistance of trial or appellate counsel was properly raised in a prisoner's first § 2255 motion. *See United States v. DeRewal*, 10 F.3d 100, 103-04 (3d Cir. 1993). The *DeRewal* court stated that ineffective assistance claims raised in this manner would not be judged under the cause and prejudice standard normally applied to collateral attacks of a conviction; instead, courts would apply the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), which finds constitutional ineffectiveness only in objectively deficient performance that prejudices the defendant. *See DeRewal*, 10 F.3d at 103-05. The reason for this decision was twofold. First, if a defendant had the same counsel at trial and on appeal, then it would be ludicrous to expect the attorney to argue on appeal that he was currently being constitutionally ineffective or that he had been ineffective at trial. *See id*. at 103.

Second, in resolving an ineffective assistance of counsel claim, a court must sometimes look outside the record, which is impermissible on direct appeal. *See id*.

When ineffective assistance of trial and appellate counsel claims are raised in a second § 2255 motion, however, the logic of *DeRewal* is no longer valid. There is no reason to apply the *Strickland* standard instead of the cause and prejudice standard in such a situation, especially when ineffective assistance claims were pursued in the first § 2255 motion. When a prisoner uses new counsel in his first § 2255 motion to pursue claims of ineffective assistance of trial or appellate counsel and later files a second § 2255 motion that also claims ineffective assistance of trial or appellate counsel, the court concludes that the prisoner must demonstrate cause and prejudice or actual innocence to be successful with the ineffective assistance claim in his second § 2255 motion.[4] That is the situation confronting the court in this case.

Beginning with his trial and ending with his second § 2255 motion, Granero has been represented by four different attorneys: one at trial, one on appeal, one for his first § 2255 motion, and one for this, his second § 2255 motion. *See* Pl.'s Am. Mot. at 6-7. Thus, Granero was able to pursue any claims of ineffective assistance of trial or appellate counsel in his first § 2255 motion. In fact, Granero did just that and raised eight grounds for ineffective assistance of trial counsel in his first § 2255 motion. *See Granero*, 1995 WL 394140, at *3. There is no reason whatsoever that Granero could not or should not have added a ninth ground for ineffective assistance: the failure of appellate counsel to pursue the issue of the alibi charge. Likewise, there is no reason that Granero could not or should not have added the prosecutor's closing statement

[4]Indeed, the abuse of writ doctrine supports just such a conclusion. *See McClesky v. Zant*, 499 U.S. 467, 494 (1991).

drug dealer reference to Ground Three of his first § 2255 motion, which dealt with his trial counsel's failure to object to the other parts of the same closing statement. *See Granero*, 1995 WL 394140, at *7. Granero has made no demonstration of cause for his failure to raise these claims in his first § 2255 motion, and as already noted, *see supra* Part II.B, he has also failed to show his actual innocence. Thus, Granero is not entitled to any relief based on Ground Four.

Additionally, even if the court did apply the *Strickland* objective deficiency and prejudice standard to the ineffective assistance claims in Granero's second § 2255 motion, the court concludes that Granero suffered no prejudice as a result of the alleged failings of his attorneys. Under *Strickland*, prejudice can be shown only when "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*., 466 U.S. at 687.

Granero's appellate counsel's failure to pursue the issue of the alibi charge was not prejudicial. An alibi defense is only effective if the alibi places the defendant in a different location than that at which the crime occurred. *See United States v. Simon*, 995 F.2d 1236, 1243 (3d Cir. 1993). Granero's "alibi" did not do this. His "alibi" placed him at a location different from that to which a phone call was placed to set up the drug deal at the center of this case. Granero was not, however, charged with receiving this phone call, nor was it an essential element of the crimes of which Granero was finally convicted: conspiracy to distribute cocaine and aiding and abetting the distribution of cocaine. Thus, Granero's "alibi" was not a true alibi because he could have committed these crimes even if he had not received the phone call. In this situation, an alibi charge was inappropriate, so the court's failure to charge the jury on the alibi defense could not have been prejudicial. Moreover, although the jury was not charged on the alibi

defense, Granero was allowed to present testimony supporting his assertion that he could not have received the phone call in question. *See* Pl.'s Am. Mot. at 5.

The court concludes that Granero was neither deprived of a fair trial nor suffered any prejudice as a result of the absence of an alibi charge. Consequently, Granero's appellate counsel was not constitutionally ineffective for failing to pursue this issue on appeal.

Similarly unprejudicial is Granero's trial counsel's failure to object to the prosecutor's closing statement drug dealer reference. Failure to object to questionable prosecutorial comments is ineffective assistance only when the comments "so infected the trial with unfairness as to make the resulting convictions a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). In ruling on Granero's first § 2255 motion, the court concluded that, however flawed, the prosecutor's closing statement was not so improper and unfair as to deny Granero due process. *See Granero*, 1995 WL 394140, at *7. The court reemphasizes that conclusion.

For all of the foregoing reasons, the court will deny Granero's motion with respect to Ground Four.

III. Conclusion

For all of the foregoing reasons, the court will deny Granero's amended § 2255 motion. An appropriate order follows.

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MANUEL GRANERO	:	
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ORDER

YOHN, J.

AND NOW, this day of March, 2000, upon consideration of the plaintiff's amended motion to vacate, set aside, or correct sentence (Doc. No. 89), the government's response thereto (Doc. No. 90), and the plaintiff's traverse (Doc. No. 91), IT IS HEREBY ORDERED that the amended motion is DENIED.

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William H. Yohn, Jr.